IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SHANNON SHAUP and JAMES SHAUP, her husband, Plaintiffs, v. SHANE FREDERICKSON and READING BLUE MOUNTAIN and NORTHERN RAILROAD COMPANY, Defendants.	: : : : : : : : : : : :	CIVIL ACTION NO. 97-7260

M E M O R A N D U M

BUCKWALTER, J. October 16, 1998

Presently before this Court is the Motion for Summary Judgment of Defendants Shane Frederickson and Reading Blue Mountain and Northern Railroad Company pursuant to Fed. R. Civ. P. 56. For the reasons discussed below, Defendants' motion is GRANTED IN PART and DENIED IN PART.

I. BACKGROUND

A. Procedural Posture

On October 11, 1997, Plaintiffs Shannon Shaup and James Shaup filed a tort action in the Court of Common Pleas of Schuylkill County, Pennsylvania against Defendants Shane Frederickson and Reading Blue Mountain and Northern Railroad Company ("RBMN"). The complaint alleged that, on November 16, 1996, Mrs. Shaup was driving her car in a southerly direction on State Road 2018 in East Brunswick Township, Schuylkill County. As she

drove onto the railroad crossing in Drehersville, Mrs. Shaup collided with a train owned by RBMN and operated by its employee, Mr. Frederickson, thereby suffering injuries. Mr. Shaup was not present in the car, but derivatively claims for loss of consortium.

Plaintiffs set forth multiple allegations of negligence stemming from the accident, which can be placed fairly into the following categories: (1) failure to provide adequate warning devices at the crossing; (2) operation of the train at an excessive rate of speed; (3) failure to slow or stop the train prior to the accident; (4) obstruction of the view of motorists approaching the crossing; (5) failure to maintain the warning devices; (6) failure of Mr. Frederickson to have given adequate and timely warning prior to approaching the crossing; (7) negligent entrustment of the operation of the train to Mr. Frederickson; and (8) loss of consortium by Mr. Shaup. Defendants timely removed the action to this Court pursuant to 28 U.S.C. §§ 1441(b) and 1446.

B. History of the Drehersville Crossing Project

Plaintiffs do not dispute the history of the Drehersville Crossing Project. In 1990, when RBMN purchased the railroad line on which Mrs. Shaup's accident occurred, the crossing was marked with cross-bucks, which are the standard, reflectorized railroad crossing signs that are in place at almost all railroad grade crossings. On October 5, 1995, the Blue Mountain School District filed a complaint with the Pennsylvania Public Utilities Commission ("PUC"), requesting that the PUC order the placement of warning lights or gates at the Drehersville crossing. Concurrently, the Pennsylvania Department of Transportation ("PennDOT") placed the Drehersville crossing at the top of its list for upgrades to crossing warning devices in the Commonwealth in 1996 pursuant to the Federal Railroad Grade Crossing Program.

On January 26, 1996, a PUC order was adopted and subsequently entered on February 1. The order provided that the Drehersville crossing had been approved for funding under the Federal Rail-Highway Crossing Safety Program. The order also provided that the flashing light railroad crossing warning signals were to be installed on or before December 31, 1997. RBMN was consequently ordered by the PUC to furnish the labor and materials necessary to complete the project. Work on the upgrade commenced shortly thereafter.

On March 20, 1996, the Federal Highway Administration ("FHWA") formally approved the use of federal funds for the installation of the grade crossing warning devices at the Drehersville crossing. On July 10, PennDOT and RBMN entered into a formal reimbursement agreement for the installation of the warning devices at the Drehersville crossing. The agreement provided that the project was eligible for federal highway funds and that the PUC had exclusive jurisdiction over the project. Naturally, the agreement also established a mechanism by which RBMN would be reimbursed by PennDOT for its actual costs on the project. PennDOT would, in turn, seek federal funds from the FHWA pursuant to the Federal Railroad Grade Crossing Program. Several reimbursements were transacted over the course of the next few months pursuant to this agreement.

As of October 8, 1996, two new reflectorized cross-bucks had been installed. Significantly, a metal box had been erected at the crossing to house the electrical controls for the flashing lights, but the lights were not yet installed on November 16th, the day of the accident. The project was completed on December 19, 1996.

C. The Accident

On November 16, 1996, Mr. Frederickson was the engineer in control of the RBMN locomotive that would collide with Mrs. Shaup's car at the Drehersville crossing. The locomotives were pulling 23 cars of coal and Mr. Frederickson had inspected the bell, horn, brakes, and lights on the locomotives earlier that morning. See Frederickson Dep. at 4-5, 20 (attached as Exhibit 4 to Defs. Mem.). Although the locomotive did not have a speedometer, Mr. Frederickson testified that the train was traveling at approximately 23-24 miles per hour, an estimate based on calculations he performed with a stopwatch during the previous mile. See id. at 35-36. The maximum allowable speed for the track on which the train was traveling had been set by federal regulation at 40 miles per hour. See Luedtke Aff. ¶ 21 (attached as Exhibit 1 to Defs. Mem.). Mr. Frederickson testified that, as he approached the crossing, he applied the bell on the locomotive and blew the horn. See Frederickson Dep. at 32.

Having a clear view of Mrs. Shaup as she approached the railroad crossing, Mr. Frederickson testified that she was traveling at approximately 20 miles per hour; that she slowed down as she approached the crossing; but that she failed to stop until she had gotten onto the railroad tracks. See id. at 34-35, 40. He stated that he saw Mrs. Shaup look straight ahead and to the right before she entered the tracks, but not to the left -- the direction from which the train was coming. See id. at 35. He further stated that he continuously sounded the horn and that he applied the emergency brakes right before impact. See id. at 40. However, because the train was too close to the crossing, the train was not able to come to a stop until all 23 coal cars had cleared the crossing. See id. at 40-42.

Unfortunately, Mrs. Shaup has no present recollection of the events leading up to and including the accident. See Shaup Dep. at 15 (attached as Exhibit 5 to Defs. Mem.). However, Mrs. Shaup is intimately familiar with this particular railroad grade crossing, having traveled through it approximately 346 times in 1996 prior to the accident and 150 times in 1995. See Pls.' Ans. to Defs.' First Set of Interrogs. at 27 (attached as Exhibit 6 to Defs. Mem.). Indeed, she had been driving through the crossing on a regular basis since 1986 and had seen trains at the crossing on at least two occasions prior to the accident. See Shaup Dep. at 27-28.

Mrs. Shaup also testified that she was aware of the requirement that she should slow down and look to see if there was a train approaching as she came to the crossing; that she was aware of the requirement to stop at a railroad crossing; and that she typically did slow her car to a stop at the Drehersville crossing prior to the day of the accident. See id. at 27, 44-45. In addition, she testified that her view of the trains approaching the crossing from her left would not have been blocked by vegetation as she drove towards the crossing but that there was a large, silver box that could have caused her to have a problem with visibility at a point 6 to 10 feet, but not 20 feet or further, from the crossing. See id. at 33-37. She also testified that she had noticed that the box had been put in on the left side of the railroad crossing approximately one week prior to the accident. See id. at 34-35.

A witness, who was outside at the time of the crash approximately one mile away from the crossing, testified that she could customarily hear train whistles or horns while working on or about the property. See Buchinsky Dep. at 11-13 (attached as Exhibit 3 to Pls. Mem.). However on the day of the accident, she did not hear the train whistles or horns. See id. at 12.

Another witness confirmed that she also did not hear a train whistle in and around this particular time. See Martz Dep. at 19-20 (attached as Exhibit 4 to Pls. Mem.).

II. DISCUSSION

A. Standard of Review

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party has the burden of demonstrating the absence of any genuine issue of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). A factual dispute is "material" if it might affect the outcome of the case under the governing substantive law. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Additionally, an issue is "genuine" "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id.

If the moving party establishes the absence of a genuine issue of material fact, the burden shifts to the non-moving party to "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). In doing so, the non-moving party must "do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). If the evidence of the non-moving party is "merely colorable," or is "not significantly probative," summary judgment may be granted. Anderson, 477 U.S. at 249-50.

Defendants move for summary judgment on three alternative grounds: federal preemption, state law preemption, and contributory negligence under Pennsylvania law. At the

outset, the Court notes that, because it is "prudent not to decide issues unnecessary to the disposition of the case, especially when many of these issues implicate constitutional questions," the order of analysis in this memorandum will address the state law grounds before proceeding to federal preemption, if necessary. Georgine v. AmChem Prods., Inc., 83 F.3d 610, 623 (3d Cir. 1996), aff'd, 117 S. Ct. 2231 (1997); accord Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 347 (1936) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.") (Brandeis, J., concurring).

B. Mrs. Shaup's Contributory Negligence

Defendants' broadest ground upon which summary judgment is requested concerns the potential negligence of Mrs. Shaup in contributing to the accident. Defendants maintain that even assuming they could be found negligent, Mrs. Shaup's failure to stop her vehicle within 15 to 50 feet of the crossing (in accordance with 75 Pa. Cons. Stat. Ann. § 3342 (West 1996)) bars her from recovery. See Defs. Mem. at 51-56. Because there is in dispute a genuine issue of material fact, Defendants' request for summary judgment on this ground is DENIED.

On a motion for summary judgment, it is not the court's role to weigh the disputed evidence and decide which is more probative; rather, the court must consider the evidence of the non-moving party as true, drawing all justifiable inferences arising from the evidence in favor of the non-moving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). If a conflict arises between the evidence presented by both sides, the court must accept as true the allegations of the non-moving party. See id.

In light of Mrs. Shaup's lack of recollection concerning the accident, Mr. Frederickson is apparently the only eyewitness who can testify as to what occurred. He has testified that Mrs. Shaup had not stopped her car until she had gotten onto the railroad tracks and that she had not looked in the direction from which the train was coming. He has further stated that he had continuously sounded the horn and that he had applied the emergency brakes right before impact.

However, there is in dispute a genuine issue as to whether Mrs. Shaup breached her duty to exercise due care. Mrs. Shaup has testified that she had been aware of the requirement to slow down, stop, and look prior to approaching the crossing and that she had typically slowed her car to a stop at the Drehersville crossing prior to the day of the accident. Coupled with the considerable number of times she has traveled through the crossing, the Court finds that she may be able to establish a habit or routine practice of slowing down, stopping, and looking whenever crossing at that particular intersection. See Fed. R. Evid. 406. (The Court, of course, reserves judgment as to the admissibility of this evidence until a more appropriate date.) This conclusion is also buttressed by other disputed testimonial evidence in the record concerning whether the whistles and bells were being blown as the train approached the crossing and whether the train was obstructed by the large, silver box. These, too, are factual issues properly decided by a jury at trial.

Accordingly, Defendants' request for summary judgment on this ground is DENIED.

C. State Law Preemption

Addressing only the claims brought in Category 1, Defendants next maintain that, consistent with the federal regulatory scheme governing railroads, 66 Pa. Cons. Stat. Ann. § 2702 (West 1979) relieves the railroad of any independent legal duty to install adequate warning devices at the crossing absent an order from the PUC. See Defs. Mem. at 43-51. Specifically, Defendants contend that the statute confers exclusive jurisdiction over crossings and their maintenance to the PUC, thereby effectively immunizing railroads from tort liability and "preempting" Plaintiffs' claims. The Court declines to read the statute in this manner and notes, in passing, that this appears to be a question of first impression under Pennsylvania law.

The statute in question provides, in relevant part:

> (a) **General rule.** -- No public utility, engaged in the transportation of passengers or property, shall, without prior order of the commission, construct its facilities across the facilities of any other such public utility or across any highway at grade or above or below grade, or at the same or different levels; and no highway, without like order shall be so constructed across the facilities of any such public utility, and, without like order, no such crossing heretofore or hereafter constructed shall be altered, relocated, suspended or abolished. . . .
>
> (b) **Acquisition of property and regulation of crossing.** -- The commission is hereby vested with exclusive power . . . to determine and prescribe, by regulation or order, the points at which, and the manner in which, such crossing may be constructed, altered, relocated, suspended or abolished, and the manner and conditions in or under which such crossing shall be maintained, operated, and protected to effectuate the prevention of accidents and the promotion of the safety of the public. . . .
>
> (c) **Mandatory relocation, alteration, suspension or abolition.** -- Upon its own motion or upon complaint, the

> commission shall have exclusive power after hearing, upon notice to all parties in interest, including the owners of adjacent property, to order any such crossing heretofore or hereafter constructed to be relocated or altered, or to be suspended or abolished upon such reasonable terms and conditions as shall be prescribed by the commission. . . .
>
> (f) **Danger to safety.** -- Upon the commission's finding of an immediate danger to the safety and welfare of the public at any such crossing, the commission shall order the crossing to be immediately altered, improved, or suspended.

66 Pa. Cons. Stat. Ann. § 2702 (West 1979). The precise issue presented is whether these quoted provisions abrogate any independent common law duty by railroads to provide adequate warning devices at crossings. That railroads are obligated to do so under Pennsylvania law is clear.

It is well established under Pennsylvania common law "that a railroad company is required to maintain crossings of its railways with public highways that are safe for travelers upon the highways." Marinelli v. Mountour R.R. Co., 420 A.2d 603, 606 (Pa. Super. 1980) (citing Pennsylvania Supreme Court cases). Indeed, not only must a railroad refrain from affirmatively creating an unsafe crossing, but "[t]he public is entitled to have crossing facilities continuously maintained in a safe condition." Scott Township v. Pennsylvania Pub. Utils. Comm'n, 146 A.2d 617, 619 (Pa. Super. 1958). Moreover, pursuant to the statute above, when a crossing becomes unsafe, for whatever reason, a railroad may be ordered, at its own expense, to alter or abolish the crossing. See 66 Pa. Cons. Stat. Ann. §§ 2702(c), (f). "This is true even though the crossing was safe at the time of construction and has become unsafe only because of events that were beyond the railroad's control." Marinelli, 420 A.2d at 607. With respect to warning travelers, a railroad must "exercise ordinary care at a crossing by adopting a reasonably

safe and effective method, commensurate with the dangers of a particular crossing, of warning travelers of the approach of the train." National Freight, Inc. v. Southeastern Pa. Transp. Auth., 698 F. Supp. 74, 78 (E.D. Pa. 1988) (Broderick, J.), aff'd, 872 F.2d 413 (3d Cir. 1989). See also McGlinchey v. Baker, 356 F. Supp. 1134, 1142 (E.D. Pa. 1973) (Becker, J.).

Turning now to the statute in question, even a plain reading of the statutory text fails to support Defendants' interpretation.

Subsection 2702(a) proscribes three discrete items without prior order of the PUC. First, it proscribes railroads from constructing its facilities across the facilities of another utility or a highway. Second, it generally proscribes the construction of a highway across the facilities of another utility. And finally, it generally proscribes the alteration, relocation, suspension, or abolishment of a previously constructed crossing. Under this last proscription, absolutely nothing is stated concerning a railroad's independent common law duty to make the crossing safe for travelers, particularly during the construction of a crossing. For example, nothing in this subsection would prevent a railroad from taking steps such as posting a flagman or a warning sign indicating that the construction was not yet completed. These actions would not "alter" the crossing in any substantial way other than informing motorists of the status of the construction, of which they otherwise would not be aware. This is especially necessary where, as here, the unfinished warning devices are visibly indistinguishable from the finished project. Whether RBMN should have taken these actions here is, of course, a matter for the trier of fact.

Subsection 2702(b), which neither party explicitly addresses, vests the PUC with exclusive power to determine the manner in which crossings will be maintained, operated, and protected in the interests of public safety. Again, nothing in the text refers to a railroad's

independent common law duty to make the crossing safe for travelers, particularly during the construction of a crossing. For example, nothing in this subsection would prevent a railroad from potentially discharging its common law duty by simply informing the PUC of potential dangers to motorists. See CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 665 n.5 (1993) (opining in dictum with respect to Georgia law that "[w]hile final authority for the installation of particular safety devices at grade crossings has long rested with state and local governments, . . . this allocation of authority apparently does not relieve the railroads of their duty to take all reasonable precautions to maintain grade crossing safety . . . including, for example, identifying and bringing to the attention of the relevant authorities dangers posed by particular crossings."). Whether RBMN should have done so here is, of course, best left to the jury.

Subsection 2702(c) vests exclusive jurisdiction with the PUC "[u]pon its own motion or upon complaint," to order a crossing to be relocated, altered, suspended, or abolished. Hence, the exclusive jurisdiction of the PUC is triggered only upon its own motion or upon complaint. Prior to that time, only subsection 2702(b) pertains to the jurisdiction of the PUC. Here, although the PUC's jurisdiction has arguably been triggered with respect to this crossing in the manner envisioned by the statute, it would be quite a stretch to read this subsection as entirely relieving railroads of their common law duty under Pennsylvania law.

Finally, subsection 2702(f) authorizes the PUC to order the immediate alteration, improvement, or suspension of a crossing "[u]pon the commission's finding of an immediate danger to the safety and welfare of the public." Hence, the authority of the PUC is triggered only upon the requisite finding. Here, there is no allegation that the PUC authority has been triggered

with respect to this crossing in the manner envisioned by the statute and thus, this subsection is entirely inapplicable to the instant dispute and cannot function to preempt Plaintiffs' claims.

Moreover, in the absence of any extrinsic evidence by Defendants that the drafters of § 2702 intended more than the plain reading would suggest, the Court declines to infer that the legislature meant to abrogate a long settled principle of state tort law. Adopting Defendants' interpretation would place plaintiffs in the untenable position of being unable to seek relief under either state or federal law (see infra) once the PUC has ordered construction of the crossing, but when the injury occurs prior to the completion of the construction.

Accordingly, Defendants' request for summary judgment on this ground is DENIED.

D. Federal Preemption

As the state law grounds do not bar Plaintiffs from proceeding to trial, the Court must necessarily pass on the constitutional questions implicated by Defendants' federal preemption arguments. Where state law conflicts with, or frustrates, federal law, the latter "shall be the supreme Law of the Land." See U.S. Const. art. VI, cl. 2; accord Maryland v. Louisiana, 451 U.S. 725, 746 (1981). However, "[c]onsideration of issues arising under the Supremacy Clause 'start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress." Cipollone v. Liggett Group, Inc., 112 S. Ct. 2608, 2617 (1992) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)). Consequently, "[i]n the interest of avoiding unintended encroachment on the authority of the States, . . . a court interpreting a federal statute

pertaining to a subject traditionally governed by state law will be reluctant to find pre-emption." CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 663-64 (1993).

Defendants contend that the Federal Railroad Safety Act ("FRSA"), 49 U.S.C. § 20101 et seq., and the regulations promulgated thereunder preempt all of Plaintiffs' claims in Categories 1 through 4. See Defs. Mem. at 24-43. As the scope of federal preemption in this area is an issue of first impression in the Third Circuit, the Court will look to other jurisdictions for guidance where appropriate. In doing so, the Court concludes that Defendants are entitled to summary judgment based on federal preemption only with respect to Plaintiffs' allegations that the train was being operated at an excessive rate of speed. The remainder of Plaintiffs' claims are not preempted by federal law.

1. Failure to Provide Adequate Warning Devices at the Crossing

In CSX Transp., Inc. v. Easterwood, 507 U.S. 658 (1993), the United States Supreme Court addressed the extent to which the FRSA and the regulations thereunder preempted a state law claim brought by the widow of a truck driver who was killed when he was struck by a train based on a failure to provide adequate warning devices. There, the crossing project was being built when the accident occurred. See id. at 671. The Secretary of Transportation had approved automatic gates for the project and motion-detection circuitry had been installed. See id. at 671-72. Although funds had been set aside, no other devices were installed because the street's width required special construction, which in turn required city approval. See id. When the city declined to approve the construction, the plan for the gates was shelved and the funds allocated for use in another project within the state. See id. at 672. The Supreme Court found no preemption, holding that state law negligence claims based on a failure

to provide adequate warning devices at a railroad crossing are preempted when "federal funds participate in the installation of warning devices." Id. at 671.

The quoted language has since been interpreted by various courts as dictating the moment when federal preemption is triggered. Some courts hold that federal preemption is triggered when federal funds are approved, authorized, committed, and expended towards the installation of the warning devices. See, e.g., Armijo v. Atchison, Topeka and Santa Fe Ry. Co., 87 F.3d 1188, 1190 (10th Cir. 1996) ("At this point, the [ ] crossing became a 'project where Federal-aid funds participate in the installation of [warning] devices,' and the type of warning device used was under the control of the Secretary of Transportation.") (citation omitted); Ingram v. CSX Transp., Inc., 146 F.3d 858, 865 (11th Cir. 1998). Focusing on the word "participate," this triggering point views federal preemption solely from the perspective of federal involvement and is irrespective of when the warning devices are actually installed. See, e.g., Hatfield v. Burlington N. R.R. Co., 64 F.3d 559, 559-60 (10th Cir. 1995).

By contrast, some courts hold that there is no preemption of state law adequacy of warning claims until the warning devices are installed and fully operational. See, e.g., Thiele v. Norfolk and W. Ry. Co., 68 F.3d 179, 184 (7th Cir. 1995); Bryan v. Norfolk and W. Ry. Co., No. 97-3077, 1998 WL 596055, at *5 (8th Cir. Sept. 10, 1998). This interpretation focuses on the entire phrase "participate in the installation" and requires completion of the crossing project before federal preemption is presumed to have occurred. "[B]ecause otherwise the public would be unprotected by either state or federal law for the period between federal approval and actual warning device installation," this conclusion follows common sense and supports "the FRSA's goal of increasing safety at railroad crossings." Thiele, 68 F.3d at 184.

While the textual analysis is a close call, the Court is persuaded by the reasoning of the courts that have adopted the latter interpretation: it is better supported by the Supreme Court's conclusion in Easterwood and conforms with notions of fundamental fairness. Accordingly, the Court now holds that, as a matter of law, state law negligence claims based on a failure to provide adequate warning devices at a railroad crossing are preempted when "federal funds participate in the installation of warning devices," which is at the point when the devices are fully installed and completely operational.

In so holding, the Court notes that the facts of the instant case present the very situation when an accident occurs before the installation of federally prescribed warning devices is fully completed and operational, but after federal financial approval and expenditure. As such, the holding dictates the result that Plaintiffs' claims are not preempted by federal law. Federal funds had been approved, authorized, committed, and expended towards the Drehersville crossing project. Indeed, the FHWA had reimbursed PennDOT on several occasions prior to the accident for amounts spent by RBMN on the construction and installation of the crossing warning devices. Significantly, as of the date of the accident, only the cross-bucks and the electrical housing box for the flashing lights had been installed; the flashing lights themselves were not yet operational. This critical fact serves to render federal preemption inoperative and, in accordance with the holding above, allows Plaintiffs' claims with respect to the adequacy of the warning devices at Drehersville crossing to proceed to trial. See Compl. ¶ 13. Defendants' request for summary judgment on these claims is DENIED.

2. Operation of the Train at an Excessive Rate of Speed

The Easterwood court also addressed the extent to which the FRSA and the regulations thereunder preempted a state law negligence claim based on the operation of the train at an excessive speed. In light of 49 C.F.R. § 213.9(a), which sets maximum allowable operating speeds for all trains for each class of track on which they travel, the Court held that the "federal regulations adopted by the Secretary of Transportation pre-empt respondents' negligence action only insofar as it asserts that petitioner's train was traveling at an excessive speed" because the regulations substantially covered the same subject matter of the state common law duty to operate the train at a moderate and safe rate of speed. 507 U.S. at 665, 675. The Supreme Court further stated that the express "savings clause" of the FRSA (currently at 49 U.S.C. § 20106), which allows state laws in certain circumstances even though otherwise preempted, did not save the claim. See id. at 675. The Court reasoned that the plaintiff's claim was based in negligence, which "provides a general rule to address all hazards caused by lack of due care, not just those owing to unique local conditions." Id. A contrary view "would completely deprive the secretary of the power to pre-empt state common law, a power clearly conferred" by the statute. Id.

Accordingly, Plaintiffs' state law negligence claims for operation of the train at an excessive rate of speed are preempted by federal law. See Compl. ¶¶ 11(b), 11(f). Defendants' motion for summary judgment on these claims is GRANTED.

3. Failure to Slow or Stop the Train Prior to the Accident

A more difficult interpretive question arises with respect to Plaintiffs' claims for a failure to slow or stop the train prior to the accident. In Easterwood, the Court indicated in a footnote that "[p]etitioner is prepared to concede that the preemption of respondent's excessive

speed claim does not bar suit for breach of related tort law duties, such as the duty to slow or stop a train to avoid a specific, individual hazard." 507 U.S. at 675 n.15. It declined, however, to address "the question of FRSA's pre-emptive effect on such claims." Id. Consequently, whether federal law preempts a particular negligence claim turns on the meaning of the phrase "specific, individual hazard" and the FRSA express savings clause, which states, in pertinent part:

> A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety when the law, regulation, or order
>
> (1) is necessary to eliminate or reduce an essentially local safety hazard;
>
> (2) is not incompatible with a law, regulation, or order of the United States Government; and
>
> (3) does not unreasonably burden interstate commerce.

49 U.S.C. § 20106.

Not surprisingly, courts have not uniformly determined what constitutes a "specific, individual hazard." For example, in O'Bannon v. Union Pac. R.R. Co., the court noted that generally,

> courts considering this issue have ruled that a 'specific individual hazard' must be a discrete and truly local hazard, such as a child standing on a railway. They must be aberrations which the Secretary could not have practically considered when determining train speed limits under the FRSA. More precisely phrased, the 'local hazard' cannot be capable of being adequately encompassed within uniform, national standards. An alternative, expansive construction of the local safety hazard language would excessively preserve local speed regulations and significantly undermine the Secretary's ability to prescribe uniform operational speeds.

960 F. Supp. 1411, 1420-21 (W.D. Mo. 1997). Thus, conditions which can and do occur at many intersections, such as multiple tracks and rail cars that obstruct view, are not unique, local conditions or specific, individual hazards. See Earwood v. Norfolk S. Ry. Co., 845 F. Supp. 880, 888 (N.D. Ga. 1993). By contrast, an obvious case of a specific, individual hazard has been described as "an engineer who sees a motorist stranded on the crossing, but nevertheless negligently fails to stop or slow his train to avoid the collision." Herriman v. Conrail, Inc., 883 F. Supp. 303, 307 (N.D. Ind. 1995). On another end of the spectrum is one court that went so far as to suggest that the state statutory or common law would have to be specifically tailored to the particular crossing at issue before an exception to federal preemption is found. See Bowman v. Norfolk S. Ry. Co., 66 F.3d 315, 1995 WL 550079, at *4 (4th Cir. Sept. 15, 1995) (stating that lack of any "evidence that the state took any action to deal with a special danger that might have existed at this particular crossing" was probative of a finding of preemption).

Upon consideration of these cases and those cited by the parties, the Court holds that a plain reading of the exception enunciated by the Easterwood court encompasses the avoidance of a specific collision. Upon realizing that a car, pedestrian, or other obstruction is unable to extricate itself from an impending collision with on-coming train, the operator has a common law tort duty to slow or stop a train to avoid a collision. This duty is manifestly related to the separate, but preempted, tort duty to operate the train at a moderate and safe rate of speed. See Armstrong v. Atchison, Topeka & Santa Fe Ry. Co., 844 F. Supp. 1152, 1153 (W.D. Tex. 1994) ("The 'specific, individual hazard' identified by the Easterwood court logically relates to the avoidance of a specific collision.").

In accordance with the Court's holding, insofar as Plaintiffs allege that the operator failed to slow or stop the train to avoid colliding with Mrs. Shaup's car "having had the opportunity to realize and appreciate [her] danger," Compl. ¶ 11(e), the claims are not preempted by federal law, see also id. ¶¶ 11(g), 11(i)-(k). Defendants' request for summary judgment on these claims is DENIED.

4. Obstruction of the View of Motorists Approaching the Crossing

Plaintiffs allege simply that Defendants permitted the view of motorists approaching the Drehersville crossing from the south on State Route 2018 to be obstructed at the time of the collision. See Compl. ¶ 13(h). While Plaintiffs' expert witness opined that vegetation along the roadbed may have obstructed a motorist's view of an on-coming train, see Report of John J. Taylor at 5-6 (attached as Exhibit 8 to Defs. Mem.), Mrs. Shaup then testified that her view of approaching trains was not obstructed by vegetation as she drove towards the crossing, see Shaup Dep. at 33, 35-36. However, she did testify that the large, silver box (containing the electrical controls for the flashing lights) obstructed her view of the on-coming train. See id. at 33-36. Plaintiffs later clarified that the obstruction claim is not based on the vegetation, but on the placement of the large, silver box on the left side of the railroad crossing. See Pls. Mem. at 33.

With respect to the federal preemption issue, Defendants contend only that the vegetation obstruction claim is preempted by 49 C.F.R. § 213.37. This issue, however, is not properly before the Court as Plaintiffs are not bringing a claim for vegetation obstruction. Additionally, Defendants have not affirmatively shown that the doctrine of federal preemption should apply to the silver box obstruction claim.

III. CONCLUSION

For the foregoing reasons, Defendant's motion is GRANTED with respect to the allegations of negligence for operation of the train at an excessive rate of speed. Defendants' motion is DENIED in all other respects. An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SHANNON SHAUP and JAMES SHAUP, her husband,	:	CIVIL ACTION
	:	NO. 97-7260
Plaintiffs,	:	
v.	:	
SHANE FREDERICKSON and READING BLUE MOUNTAIN and NORTHERN RAILROAD COMPANY,	:	
Defendants.	:	

O R D E R

AND NOW, this 16th day of October 1998, upon consideration of the Motion for Summary Judgment of Defendants Shane Frederickson and Reading Blue Mountain and Northern Railroad Company (Docket No. 9), Plaintiff's response thereto (Docket No. 11), and Defendants' Reply Brief in Support of Motion for Summary Judgment (Docket No. 12), it is hereby ORDERED that Defendants' motion is GRANTED IN PART and DENIED IN PART, in accordance with the accompanying memorandum.

BY THE COURT:

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RONALD L. BUCKWALTER, J.